



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-1923

STATE OF CALIFORNIA,

Petitioner,

v.

JOHN WALTER CARROLL,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

RUSSELL IUNGERICH
LAW OFFICES OF RUSSELL IUNGERICH
205 S. Broadway, Suite 808
Los Angeles, CA 90012
Telephone: (213) 625-0387

Attorney for Respondent
JOHN WALTER CARROLL

TABLE OF CONTENTS

	<u>Page</u>
BRIEF OF RESPONDENT IN OPPOSITION	
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT	
I. THE CALIFORNIA COURT OF APPEAL HAS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT	15
II. RESPONDENT CARROLL'S CONDUCT DID NOT JUSTIFY HIS EXCLUSION FROM THE COURTROOM UNDER <u>ILLINOIS V. ALLEN</u> CRITERIA	17
CONCLUSION	19
PROOF OF SERVICE	20

TABLE OF AUTHORITIES

Cases

Faretta v. California, 422 U.S. 806 (1974)	15-16
Illinois v. Allen, 397 U.S. 337 (1970)	15-18

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<u>Cases (Cont'd)</u>	
People v. Carroll, 140 Cal.App.3d 135 (1983)	14
<u>United States Constitution</u>	
Amendment XIV	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-1923

STATE OF CALIFORNIA,

Petitioner,

v.

JOHN WALTER CARROLL,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal is published and reported as 140 Cal.App.3d 135, 189 Cal.Rptr. 327 (filed February 23, 1983). On April 20, 1983, the California Supreme Court denied a timely petition for hearing filed by the State of California. The order denying the petition for hearing is unreported. Copies of the

California Court of Appeal opinion and the order of the California Supreme Court denying the petition for hearing are attached to the petition for writ of certiorari as appendices A and C respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment VI, provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . to have the assistance of counsel for his defense."

United States Constitution, amendment XIV, section 1, provides in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law;"

STATEMENT OF THE CASE

Respondent John Walter Carroll was convicted of first degree murder in a California superior court after a jury trial. The California Court of Appeal has reversed that conviction and ordered a new trial.

Respondent Carroll was granted the right to represent himself in this first degree murder case. (RT 17-A, lines 12-16.) After the jury was sworn, the judge who presided at the trial admonished respondent Carroll in the following words:

"As indicated, you are entitled to represent yourself throughout the course of the trial, should you desire. If you start making statements, disrupting the trial, the court will have to have you removed. The court will not physically force you to stay in

trial. The court will physically remove, though, if you disrupt the course of the trial." (RT 90.)

After hearing these remarks, respondent Carroll said that he felt he was not competent to represent himself and asked that the court ". . . appoint to the defendant a court-appointed attorney." (RT 90.) The court did not respond to this request. (RT 90-91.)

The prosecutor made his opening statement to the jury. Then the court told respondent Carroll that he had an opportunity to make an opening statement, ". . . which would mean what you would expect any witnesses to testify to." (RT 91.) Respondent Carroll replied as follows in the presence of the jury:

"THE DEFENDANT: Your Honor, I would try. I will attempt.

"First of all, I would like for the jury to know that I am not competent to represent myself. My motion to relieve myself as counsel was timely made." (RT 91, lines 25-28.)

Rather than warning the defendant that such comments were not within the scope of a proper opening statement and admonishing the jury to disregard them, the court immediately reacted by stating: "Mr. Carroll, we are going to have to remove you from the courtroom. You have the opportunity to make an opening statement. But you cannot tell the jury something that is irrelevant and does not relate to the evidence." (RT 92, lines 2-5.)

When respondent Carroll asked that the record reflect that he was being physically removed from the courtroom, the court

relented that he would not be removed if he wished to make a proper opening statement. The court did not ever explain the proper way to make an opening statement to this lay defendant, but ambiguously said that he could not make it on the basis of "something that's irrelevant to the charge." The court concluded his remarks by stating respondent Carroll could make an opening statement, but that ". . . if you start making a statement, something that's not relevant to the charge, then, in that event, the court will have to have you physically removed." (RT 92.) Respondent Carroll responded to the judge that he would like the jury to know that he, the defendant, was never served any papers as to what time this person [presumably the victim] died. (Id.)

This remark triggered the court's request to the bailiff to remove respondent

Carroll from the courtroom. Respondent Carroll blurted out that he was not in town at the time and that he did not know "anything about it." Respondent Carroll asked that the record reflect that he was being physically removed from the courtroom. The court replied that "The record will so indicate with pleasure." (RT 93.)

The trial then proceeded in the complete absence of respondent Carroll or of anyone representing him in his absence. Sharon I. Schnittker, the deputy medical examiner-coroner, was examined as to her findings in the absence of respondent Carroll during the remainder of the session held on the morning of September 16, 1981. (RT 93-121.) Respondent Carroll was brought to the courtroom at 1:40 p.m. that day where he was told that the coroner was testifying, and the court told him that he could remain to

listen to testimony and ask questions. Respondent Carroll was also told that he could present witnesses on his own behalf. Respondent Carroll again stated that he was a layman and was not competent to represent himself. (RT 122.)

Respondent Carroll remained in the courtroom for the remaining three questions and answers of the prosecutor's direct examination of the deputy medical examiner-coroner. (RT 125, lines 1-15.) The court then told respondent Carroll that he might cross-examine this witness (the bulk of whose direct examination he had not heard). At this point, respondent Carroll uttered the following incomplete remark:

"THE DEFENDANT: Due to my lack of understanding of legal terms, I was not aware -- I was not asked to give up my pro per status to be

fully represented by
court-appointed attorney and --"
(RT 125.)

If this incomplete sentence was an
objection, the court never allowed it to be
fully expressed. The following colloquy
ensued:

"THE COURT: Mr. Carroll, the
court will have to remove you if --

"THE DEFENDANT: I was not
allowed to --

"THE COURT: Please remove Mr.
Carroll.

"THE DEFENDANT: May the record
reflect that the defendant is being
physically removed from the court.

"THE COURT: The record will so
reflect.

"(Defendant leaves the
courtroom.)" (RT 125.)

The deputy medical examiner-coroner was then excused without any cross-examination by the defendant. (RT 126.) The right to physical presence in the courtroom and to cross-examine this witness was forfeited because of the incomplete sentences uttered by Mr. Carroll in the quotations set forth immediately above. Of course, since respondent Carroll was representing himself, the defense could not meaningfully respond to testimony which respondent Carroll had not heard. Nor was there really any way to cross-examine even witness Schnittker when he had not heard her complete direct examination. During the period of respondent Carroll's removal from the courtroom, the trial was a travesty of a fair trial because the defense was wholly absent. There was no adversary in the courtroom to protect respondent Carroll's interests.

Respondent Carroll remained outside the courtroom pursuant to court order during the entire testimony of witness Alfredo Walltower. (RT 126-131.) Witness Walltower was excused without any cross-examination. Walltower established that respondent Carroll lived with the victim in the apartment where her body was discovered; he also recounted the circumstances leading to the discovery of her body. Id.

Respondent Carroll was also outside the courtroom for most of the testimony of 11-year-old John Allan Rupe, a key prosecution witness who testified to respondent's having beaten the victim and to respondent's likely being the last person to see her alive. Respondent Carroll was only brought to the courtroom so that young John could identify Carroll in front of the jury. (RT 153, lines 11-24.) Although respondent

Carroll had been outside of the courtroom during John Rupe's testimony and thus could not have heard anything other than the in-court identification, the court nevertheless tendered the right to cross-examine with these limitations:

"Mr. Carroll, you are present in court. You have the right to ask this witness some questions, if you desire. But you must limit your inquiries to the case at hand and to what this witness may or may not have seen." (RT 153-154.)

Respondent Carroll replied, "Your Honor, I don't know what to ask this witness. I am not competent to represent myself." (RT 154.) When respondent Carroll repeated this remark, the court excused witness John Rupe without cross-examination. Id. How even a competent trial lawyer could cross-examine a

witness whose testimony he has not heard is the unanswered question in this case. The gesture of offering to let a defendant ask questions is meaningless if he has not heard what the witness has said, particularly so when this trial judge has admonished that he will not tolerate questions beyond what the witness may or may not have seen. If the defendant has not heard direct testimony, how can he hope to stay within these boundaries?

In an nutshell then, respondent Carroll exercised his right to represent himself at trial and, during the People's case, was, from time to time, excluded from the courtroom by court order which the trial court considered unacceptable. During these periods of absence, no defense counsel was present nor did Carroll have access to the proceedings by any electronic means. When so excluded, Carroll could neither see nor hear

what was transpiring in the courtroom.

The California Court of Appeal has held that "Proceeding with trial, under the circumstances of this case, in the total absence of the defendant or counsel for the defense was error. The kind of error which occurred in this case was so fundamental that it goes to the essence of a fair trial." People v. Carroll, 140 Cal.App.3d 135, 136-137 (1983).

REASONS WHY THIS CAUSE SHOULD NOT
BE REVIEWED BY THIS COURT

I

THE CALIFORNIA COURT OF APPEAL HAS CORRECTLY
FOLLOWED THE DECISIONS OF THIS COURT

In footnote 46 of Faretta v. California,
422 U.S. 806, 834-835 (1974), this Court
stated:

"We are told that many criminal
defendants representing themselves may use
the courtroom for deliberate disruption of
their trials. But the right of
self-representation has been recognized from
our beginnings by federal law and by most of
the States, and no such result has thereby
occurred. Moreover, the trial judge may
terminate self-representation by a defendant
who deliberately engages in serious and
obstructionist conduct. See Illinois v.
Allen 397 U.S. 337. Of course, a State
may--even over objections by the

accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. . . ."

Faretta was therefore controlling in this case, and the California Court of Appeal properly followed Faretta. If respondent Carroll's conduct was disruptive, then the trial judge should have terminated his right of self-representation and appointed counsel rather than excluding Carroll from courtroom and proceeding in the absence of Carroll or any one appearing on behalf of the defense.

Illinois v. Allen, 397 U.S. 337 (1970), clearly does not stand for the proposition that a defendant representing himself may be excluded from his trial and, in effect, be tried in absentia without the presence of

counsel to represent his interest. In Illinois v. Allen, this Court's opinion reflects the presence of counsel during all portions of the trial when Allen was excluded from the courtroom. Id. at 339-342.

II

RESPONDENT CARROLL'S CONDUCT DID NOT JUSTIFY HIS EXCLUSION FROM THE COURTROOM UNDER ILLINOIS V. ALLEN CRITERIA

Illinois v. Allen, supra, 397 U.S. 337, does not authorize the removal of a defendant from the courtroom for simple misconduct, such as failure to make opening statement that merely summarizes the evidence or failure to be knowledgeable of evidentiary rules which a lawyer might know. Allen was handed down with the extreme case of courtroom disruption in mind.

The instant case was not such an extreme case. In this case, the defendant was excluded initially for making statements to

the jury which were not proper in an opening statement. A simple curative instruction to the jury would have handled the situation, rather than exclusion from the courtroom. When respondent Carroll was excluded the second time, it is apparent that he was attempting to articulate an objection about continued enforcement of his decision to represent himself. The court did not even hear him out; instead respondent Carroll was excluded "with pleasure."

Even if Carroll had not been representing himself, his conduct was insufficient to justify his exclusion from the courtroom. There is simply no evidence in this record to suggest that Carroll's conduct was significantly disruptive. Respondent Carroll's conduct was tame when compared to the conduct of the defendant in Illinois v. Allen.

In short, respondent Carroll should not have been excluded from the courtroom at all in this case because his conduct was not disruptive enough to warrant that extreme sanction. The trial judge in this case overreacted. He figuratively used a cannon to swat a fly.

CONCLUSION

For the foregoing reasons, respondent Carroll urges that the petition for writ of certiorari be denied.

Respectfully submitted,

RUSSELL IUNGERICH
Attorney for Respondent
JOHN WALTER CARROLL

RI:dl
6-10-83

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is, 205 South Broadway, Suite 808, Los Angeles, CA 90012. I am employed by a member of the bar of this court.

On _____, I served the within

BRIEF OF RESPONDENT IN OPPOSITION

in said action, by placing a true copy thereof addressed as follows and delivered the same to Michael Buter Attorney Service for hand delivery.

John K. Van de Kamp, Attorney General
Howard Schwab, Deputy Attorney General
3580 Wilshire Blvd., Rm. 800
Los Angeles, CA 90010

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ____ day of _____, 19 ____, at Los Angeles, California.

Debi Ludvickson